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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MARVIN GOLDSTON, JR.,

12
13 Petitioner,

14 v.

15 NEW FOLSOM STATE PRISON,

16 Respondent.
17

Civil 11-2190 LAB (CAB)
No.

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

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19 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
20 Corpus pursuant to 28 U.S.C. § 2254.

21 **REQUEST TO PROCEED IN FORMA PAUPERIS**

22 Petitioner has not paid the \$5.00 filing fee and has filed a request to proceed in forma
23 pauperis pursuant to 28 U.S.C. § 1915(a). The request to proceed in forma pauperis is **DENIED**
24 because Petitioner has not provided the Court with sufficient information to determine
25 Petitioner's financial status. A request to proceed in forma pauperis made by a state prisoner
26 must include a certificate from the warden or other appropriate officer showing the amount of
27 money or securities Petitioner has on account in the institution. Rule 3(a)(2), 28 U.S.C. foll.
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1 § 2254; Local Rule 3.2. Petitioner has failed to provide the Court with the required Prison
2 Certificate.

3 **FAILURE TO NAME PROPER RESPONDENT**

4 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On
5 federal habeas, a state prisoner must name the state officer having custody of him as the
6 respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28
7 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to
8 name a proper respondent. See id.

9 The warden is the typical respondent. However, “the rules following section 2254 do not
10 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
11 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
12 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
13 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
14 be the state officer who has official custody of the petitioner (for example, the warden of the
15 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

16 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
17 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
18 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
19 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
20 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
21 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
22 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
23 at 895.

24 Here, Petitioner has incorrectly named “New Folsom State Prison,” as Respondent. In
25 order for this Court to entertain the Petition filed in this action, Petitioner must name the warden
26 in charge of the state correctional facility in which Petitioner is presently confined or the
27 Director of the California Department of Corrections. Brittingham v. United States, 982 F.2d
28 378, 379 (9th Cir. 1992) (per curiam).

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

It is unclear whether Petitioner has raised his claims in the California Supreme Court. Petitioner indicates he did not seek review in the California Supreme Court. (See Pet. at 4-5.) However, he has attached an order denying a petition for writ of habeas corpus from the California Supreme Court. (Pet. at 3.) If Petitioner has raised his claims in the California Supreme Court he must so specify. “The burden of proving that a claim has been exhausted lies with the petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v. Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

1 (A) the date on which the judgment became final by the
2 conclusion of direct review or the expiration of the time for seeking
such review;

3 (B) the date on which the impediment to filing an application
4 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
5 by such State action;

6 (C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has been
7 newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

8 (D) the date on which the factual predicate of the claim or
9 claims presented could have been discovered through the exercise
of due diligence.

10 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

11 The statute of limitations does not run while a properly filed state habeas corpus petition
12 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
13 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
14 when its delivery and acceptance [by the appropriate court officer for placement into the record]
15 are in compliance with the applicable laws and rules governing filings.”). However, absent some
16 other basis for tolling, the statute of limitations does run while a federal habeas petition is
17 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

18 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
19 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
20 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
21 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
22 habeas relief because he has not alleged exhaustion of state court remedies.

23 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

24 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
25 has failed to allege that his state court conviction or sentence violates the Constitution of the
26 United States.

27 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
28 federal habeas corpus claims:

1 The Supreme Court, a Justice thereof, a circuit judge, or a district
 2 court shall entertain an application for a writ of habeas corpus in
 3 behalf of a person in custody pursuant to the judgment of a State
 court only on the ground that he is in custody in violation of the
 Constitution or laws or treaties of the United States.

4 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
 5 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
 6 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
 7 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
 8 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
 9 United States.” See 28 U.S.C. § 2254(a).

10 Here, Petitioner claims that (1) he was released from Charter Hospital after the hospital
 11 took him off his medications for 40 days and a week later he committed a violent felony; (2)
 12 Randall Toreez visited him in jail and gave him social security checks which he believes were
 13 fraudulently obtained; (3) he believes the medication study in which he participated was a fraud
 14 perpetrated by the Food and Drug Administration. (Pet. at 6-12.) In no way does Petitioner
 15 claim he is “in custody in violation of the Constitution or laws or treaties of the United States.”
 16 28 U.S.C. § 2254.

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